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No. 98-8384

IN THE

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, Warden, Sussex I State Prison,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In applying 28 U. S. C. §2254(d)(1), what kinds of challenges to state court decisions are evaluated under "contrary to . . . clearly established Federal law," and what kinds are evaluated under "unreasonable application of clearly established Federal law"?

2. What standard is used to determine if an application is "unreasonable"?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Fourteen years ago, Terry Williams robbed elderly Harris Stone, striking him on the chest and back with a mattock, killing him. *Williams* v. *Commonwealth*, 360 S. E. 2d 361, 363-364 (Va. 1987). A few months later, he committed "a vicious and brutal malicious wounding of an elderly lady . . . that caused extensive brain damage and left her a 'vegetable.' " *Id.*, at 370. He had an extensive record of other crimes. *Ibid.*

Following affirmance of his death sentence on direct appeal, there was a state habeas proceeding. The principal claim was ineffective assistance of counsel in the penalty phase for failure to present evidence of a " 'deprived and abused upbringing' "

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

and omitting a character witness. *Williams* v. *Warden*, 487 S. E. 2d 194, 197 (Va. 1997). The Virginia Supreme Court rejected the claim, finding that petitioner had not established "a 'reasonable probability' that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome." *Id.*, at 199.

On federal habeas, the District Court granted relief, but the Fourth Circuit reversed the grant. *Williams* v. *Taylor*, 163 F. 3d 860, 862-863 (CA4 1998). Applying 28 U. S. C. § 2254(d)(1), the court held that the state court's assessment of reasonable probability was not unreasonable. 163 F. 3d, at 868.

SUMMARY OF ARGUMENT

The new statutory standard is a rule of prior adjudication, *i.e.*, a modified rule of res judicata. It is not a codification or modification of *Teague* v. *Lane*, and that case still applies as an independent limitation. The courts of appeals which have addressed the question have unanimously held that *Wright* v. *West*-type claims, applying settled legal standards to case-specific facts, are evaluated under the "unreasonable application" branch of the statute. The correct method for applying the statute is largely that outlined by the Eleventh Circuit in *Neelley* v. *Nagle*. The statute is constitutional beyond serious question and precludes relief in this case.

ARGUMENT

I. Section 2254(d) is a modified rule of res judicata.

A. Plain Meaning.

Before examining the trees, it is worthwhile to step back and see which forest we are in. The scope and application of a rule are illuminated by the nature of the rule. The scope of *Teague* v. *Lane*, 489 U. S. 288 (1989) was determined in part by its nature as a rule of retroactivity and not a standard of review. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Ken-

nedy, J., concurring in the judgment). In the same way, the proper scope of the new statutory rule is determined in part by its nature.

The place to begin, as Senator Biden noted in the debate, is at the top. See 141 Cong. Rec. S7842 (daily ed. June 7, 1995). "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court *shall not be granted* with respect to any claim *adjudicated on the merits* in State court proceedings *unless* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. This is a rule of prior adjudication. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. S7842 (daily ed. June, 7, 1995) (statement of Sen. Biden); Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998).[2]

The attempts to pound the square peg of § 2254(d) into the round hole of retroactivity typically focus on the exceptions and ignore the rule. For example, Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decision-making Required of Article III Courts, 98 Colum. L. Rev. 696, 866-868 (1998) quote the main body of subsection (d) along with paragraph (1), but then never mention the general rule in their statutory analysis. See also Brief for Petitioner 26-39 (same); Brief for the American Civil Liberties Union as *Amicus Curiae* 4-13 (same) ("ACLU Brief"). These arguments are

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2. This article is cited throughout this brief out of necessity, not hubris. To stay within the page limit, the discussion is thin in spots, referring to the article for a more complete discussion.

mistaken on their own terms. More fundamentally, though, it would be exceedingly odd for Congress to have expressed the basic nature of the rule in the exceptions rather than the main rule.

If Congress were going to codify or modify *Teague* and enact a rule of retroactivity, one would expect the topics of retroactivity, time, and choice of governing law to be placed front and center, *i.e.*, something like this:

> "(a) RETROACTIVE APPLICATION OF NEW RULES—
>
> . . . . .
>
> " 'Sec. 2257. Law applicable
>
> " 'In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's conviction became final. A court considering a claim under this chapter shall consider intervening decisions by the Supreme Court of the United States which establish fundamental constitutional rights.'." S. 1657, 103d Cong., 1st Sess. § 304(a) (1993).

One would further expect that when such a bill reached the floor, the *Teague* decision and other retroactivity cases would be prominent in the debate. That is what happened in the debate on S. 1657, *supra*, which really was a retroactivity provision. See 139 Cong. Rec. 29,444-29,449 (1993). That is not what happened in the debate over S. 735. *Teague* was not even mentioned on the floor. The same Senators (Hatch, Biden, and Specter) who debated *Teague* and retroactivity in considering S. 1657 debated the present measure at length without mentioning *Teague*. 141 Cong. Rec. S7831-S7849 (daily ed. June 7, 1995). The best the other side can point to is a few ambiguous impromptu responses by witnesses to a question in a committee hearing. See ACLU Brief 27, n. 47. A weaker example of legislative history is difficult to imagine.

The word actually used on the floor was not "retroactivity," but "deference." "As one commentator accurately recounts, in

both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' " *Matteo* v. *Superintendent*, 171 F. 3d 877, 890 (CA3 1999) (en banc). The word "deference" is important, because that is the kind of rule that the concurring Justices in *West* emphatically declared that *Teague* was not. *Wright* v. *West*, *supra*, 505 U. S., at 304 (O'Connor, J., concurring in the judgment); *id.*, at 307 (Kennedy, J., concurring in the judgment). Both the supporters and opponents understood that this bill took the step that the Court considered, but did not take, in *West*. In light of the case law under the prior statute, and Congress's arguable ratification of it in 1966, see *id.*, at 294-295 (plurality opinion), the step was properly one for Congress rather than the Court to take. See *id.*, at 305-306 (O'Connor, J., concurring in the judgment); see also *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989) (statutory interpretation precedents have special weight as *stare decisis*, precisely *because* Congress can abrogate them); Scheidegger, *supra*, 98 Colum. L. Rev., at 888-889.

The language of subsection (d) closely tracks the language of subsection (b), the exhaustion rule. That is because they are similar rules. Subsection (a) states the exclusive ground for granting federal habeas relief to a state convict: "that he is in custody in violation of the Constitution or laws or treaties of the United States." Subsections (b) and (d) state reasons for not reaching the underlying claim, based on what did or did not happen in state court. Section (b) forbids relief if the prisoner has *not* fairly presented his claims to state courts, with certain exceptions. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). Subsection (d) forbids relief if the state courts *have* decided the claims against the prisoner, with certain exceptions.

In both subsections, the exceptions deal with gross deficiencies in the state process. If state process is absent or ineffective, it need not be exhausted. 28 U. S. C. § 2254(b)(1)(B). If a state court fails to apply a clearly established Supreme Court precedent or applies it unreasonably, its judgment does not bar

relief. § 2254(d)(1); *Neelley* v. *Nagle*, 138 F. 3d 917, 924 (CA11 1998). But if the state provides effective process, the state court recognizes the correct rule of law, and the state court reasonably applies the rule to the facts, then that decision stands, subject only to review by higher state courts and by this Court on certiorari. This rule is the natural result of principles recognized by this Court. "Direct review is the principal avenue for challenging a conviction . . . . 'The role of federal habeas proceedings, while important . . . , is secondary and limited.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 633 (1993) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)).

> "We may mystify any thing. But if we take a plain view of the words of the [statute], and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880).

The nature of this rule is plain and found on the surface. It forbids granting a claim previously rejected by a coordinate court, unless an exception applies. It is a rule of prior adjudication, not a rule of retroactivity or choice of law.

B. Tradition—Generally.

Far from being a radical innovation, the new rule brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court. That has been the rule, if not from day one, at least from year two. The first Congress, in its second session, enacted the Full Faith and Credit Act. See *Baker* v. *General Motors Corp.*, 522 U. S. 222, 232, n. 4 (1998); Act of May 26, 1790, ch. 11, 1 Stat. 122; 28 U. S. C. § 1738; Scheidegger, *supra*, 98 Colum. L. Rev., at 912.

This statute applies to federal courts as much as state courts. *Mills* v. *Duryee*, 7 Cranch (11 U. S.) 481, 485 (1813). It applies to federal questions as well as state-law questions, and it does not permit reexamination of the merits. "That the adjudication of federal questions by the [state court] may have been erroneous is immaterial for purposes of *res judicata*." *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947); see also *Allen* v. *McCurry*, 449 U. S. 90, 103 (1980) (no right to relitigate in federal court).

In cases where res judicata does not apply, relitigation of an issue may be barred by the "law of the case" doctrine. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Agostini* v. *Felton*, 521 U. S. 203, 236 (1997). This "doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 816 (1988); Scheidegger, *supra*, 98 Colum. L. Rev., at 914, and n. 158.

The doctrine is more flexible than res judicata, however, *Arizona* v. *California*, 460 U. S. 605, 618 (1983), and it does not stop a court from reconsidering an issue if the prior decision "is *clearly* erroneous and would work a manifest injustice." *Id.*, at 618, n. 8 (emphasis added); *Agostini*, *supra*, 521 U. S., at 236. The term "clearly" is important here. Upon finding the decision of the first court to be *plausible*, the inquiry of the coordinate court ends. *Christianson*, *supra*, 486 U. S., at 819.

Unlike res judicata, law of the case depends on the relative status of the courts in question. A higher court hearing an appeal is not bound by a decision of a lower court. See *id.*, at 817. Conversely, a lower court is not entitled to declare the higher court decision clearly erroneous and disregard it. See *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U. S. 425, 427-428 (1978).

On one point, *amicus* ACLU is exactly right: "Inferior federal courts and state courts are co-equals; both answer only

to this Court." ACLU Brief 4; see also Scheidegger, *supra*, 98 Colum. L. Rev., at 898-899. The problem is that since *Brown* v. *Allen*, *supra*, 344 U. S. 443 (1953), they have not been treated as co-equals. Congress has acted to correct that anomaly, based squarely on the premise that "[s]tate courts, in many respects, are just as good, if not better, than the Federal courts—in these areas, just as good." 141 Cong. Rec. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch).

Congress did not exactly adopt the coordinate-court law-of-the-case doctrine in § 2254(d). It crafted a new rule. Yet the rule is closely analogous to law of the case, and it proceeds on a similar premise. In essence, Congress has told the federal district and circuit courts to stop treating the state courts as lower courts and start treating them as coordinate courts.

C. Tradition—Habeas.

Courts and commentators sometimes blithely assert that res judicata has never applied in habeas corpus. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 423 (1963), overruled on other grounds, *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). At common law, that was true of the output of habeas but not the inputs. That is, a prior denial in habeas did not preclude a successive petition. See *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). It is not true, though, that the habeas court was free to ignore the res judicata effect of other judgments, especially a judgment of conviction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830) holds unambiguously to the contrary. See Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932 (discussing *Watkins*).

The subsequent history has been discussed many times and need not be repeated here. Suffice it to say that before *Brown* v. *Allen*, *supra*, this Court had developed two discretionary rules of prior adjudication. First, contrary to the common law rule, a judge presented with a successive petition could, but need not, consider the prior denial, even to the point of giving it controlling weight. *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924); see *McCleskey*, *supra*, 499 U. S., at 481-482.

Second, *Darr* v. *Burford*, 339 U. S. 200, 214 (1950), overruled on other grounds, *Fay* v. *Noia*, *supra*, 372 U. S., at 435-436, acknowledged that the adjudication on direct review would not be res judicata. However, *Darr* held unequivocally that following state review and denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.] Thus there is *avoided* . . . repeated adjudications of the same issues *by courts of coordinate powers*." *Id.*, at 215 (emphasis added).

Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one. The persistent myth that denial of habeas relitigation in this era was based on a substantive theory of due process rather than a rule of prior adjudication, see, *e.g.*, Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 663 (1982), is just that—a myth.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey*, *supra*, 499 U. S., at 493, and finally into the codified rule of 28 U. S. C. § 2244(b). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown*, *supra*, effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953 discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expan-

sive during Reconstruction, see Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1117-1118 (1995), retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown*, *supra*; *Fay* v. *Noia*, *supra*, and retracted again in the last quarter of this century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague*, *supra*, *Coleman*, *supra*, and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

D. Teague Survives.

There were some comments after AEDPA that the rule of *Teague* had been supplanted. See, *e.g.*, Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 866. This is wishful thinking by the rule's intractable opponents. See Scheidegger, *supra*, 98 Colum. L. Rev., at 959, n. 500.

Breard v. *Greene*, 523 U. S. 371, 377 (1998) (*per curiam*) sets that claim to rest. *Teague* remains as an independent limitation on the scope of habeas relief. Where the state court has ruled on the merits, *Teague* will overlap with § 2254(d)(1). There are, however, a number of situations when *Teague* will continue to have independent force.

In *Breard*, petitioner claimed novelty as cause for his default. *Ibid.*; cf. *Reed* v. *Ross*, 468 U. S. 1, 14-15 (1984). *Teague* effectively shuts down this route, unless one of its exceedingly narrow exceptions applies. *Teague* also has independent force when the federal court has decided, rightly or

wrongly, that a state's procedural default rule is not adequate and independent. Claims defaulted on appeal in the nation's largest state are presently in this status. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1393 (CA9 1996), cert. denied *sub nom. Calderon* v. *Morales*, 519 U. S. 1001 (1996). The class of claims to which *Teague* applies but § 2254(d)(1) does not remains significant.

Congress could not possibly have intended to withdraw *Teague*'s protection from this entire class of claims. That would be contrary to the entire thrust and purpose of the bill. The judicially created limitation of retroactivity and the legislatively created limitation of prior adjudication stand as independent grounds for decision. In many cases both apply, but each reaches claims that the other does not.

II. The Courts of Appeals have unanimously rejected the thesis that review of mixed questions is unchanged.

When the AEDPA passed Congress, the legislative counsel for *amicus* ACLU acknowledged what all involved understood at the time: that the bill had fundamentally changed habeas corpus, and that federal courts would no longer be able to overturn state court decisions for mere disagreement. Thompson, Congress OKs Broad Reform of "Great Writ," L. A. Daily Journal, Apr. 19, 1996, p. 8, col. 2. *Amicus* CJLF agreed with the ACLU's assessment of the magnitude of the change, though disagreeing on its desirability. *Ibid.*

Now petitioner, with the support of the ACLU and others, would have this Court believe that the long, bitter debate over this Act was much ado about not very much, that supporters and opponents were both mistaken, and that the Act does little more than tinker at the edges of *Teague* v. *Lane*, 489 U. S. 288 (1989). See Brief for Petitioner 32-33; ACLU Brief 2; Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 867-873.

The most important area of dispute involves the "mixed question" situation, where the applicable rule is clearly estab-

lished but general in its terms, and the dispute involves the application of that rule to specific facts. Petitioner claims that the AEDPA left this area unchanged, and he claims five circuits in support. Brief for Petitioner 39, n. 20. Actually, this thesis has been unanimously rejected by the circuits which have considered it.

As petitioner acknowledges, the Fourth, Fifth, Seventh, and Eleventh Circuits are contrary to his position. See Brief for Petitioner 40; *Drinkard* v. *Johnson*, 97 F. 3d 751, 767-768 (CA5 1996) ("unreasonable application" clause applies to mixed questions of law and fact); *Lindh* v. *Murphy*, 96 F. 3d 856, 870 (CA7 1996), rev'd on other grounds, 521 U. S. 320 (1997) (same); *Neelley* v. *Nagle*, 138 F. 3d 917, 924 (CA11 1998) (following *Drinkard*); *Green* v. *French*, 143 F. 3d 865, 870 (CA4 1998) (largely the same, with different analysis for factually indistinguishable cases).

Other circuits have taken different analytical approaches. However, when we look carefully at how those approaches are applied to decide actual cases, we see that the differences are more apparent than real. Most importantly, all the circuits with a defined position agree that when the state court applies the correct general rule to specific facts, its decision stands if it is reasonable, and mere disagreement is insufficient for collateral attack.

Petitioner relies on *Ayala* v. *Speckard*, 89 F. 3d 91 (CA2 1996) for the Second Circuit's position in favor of "plenary" relitigation of such claims. However, the Second Circuit subsequently granted rehearing en banc. The en banc court rendered its decision after *Lindh* v. *Murphy*, 521 U. S. 320 (1997), and hence did not need to discuss the AEDPA. See *Ayala* v. *Speckard*, 131 F. 3d 62 (CA2 1997). The panel decision in *Ayala* therefore has no value as precedent, and the Second Circuit has not since taken a definite stand. See *Smalls* v. *Batista*, No. 98-2526, text accompanying n. 5 (CA2 July 30, 1999) (noting but not taking position in circuit split).

The first court of appeals case to expressly disagree with *Drinkard* and *Lindh* was the First Circuit opinion in *O'Brien* v. *Dubois*, 145 F. 3d 16 (CA1 1998). *O'Brien* held that "the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim." *Id.*, at 24. If so, the court proceeds with the "contrary to" prong and otherwise goes to the "unreasonable application" prong. *Ibid.*

Despite its superficial similarity to the Liebman approach, in actual application the First Circuit is closer to *Drinkard* and *Lindh*. Its "contrary to" analysis is limited to *specific* rules, *id.*, at 25, and if "no Supreme Court precedent is dispositive of a petitioner's claim," *ibid.*, the First Circuit proceeds to "unreasonable application." "This reduces to a question of whether the state court's derivation of a case-specific rule from the [Supreme] Court's generally relevant jurisprudence appears objectively reasonable." *Ibid.*

Applying the standard to O'Brien's Confrontation Clause claim of restricted recross-examination, the court found the general rule of effective cross-examination insufficiently specific for the "contrary to" branch. The state court's resolution was plausible, and that was sufficient to deny relief under § 2254(d)(1). *Id.*, at 27.

Bui v. *DiPaolo*, 170 F. 3d 232 (CA1 1999) eliminates any doubt that the First Circuit does not support petitioner's thesis. On Bui's Confrontation Clause claim, the state and federal courts agreed that the relevant legal principles reduced the question to whether Bui had made a sufficient foundational showing of witness bias to entitle him to cross-examination on the point. The question of whether evidence is sufficient to meet a particular legal standard is the quintessential "mixed question," the kind involved in *Wright* v. *West*, 505 U. S. 277 (1992). *Bui* examined the state court's determination for reasonableness. 170 F. 3d, at 244. The court expressly rejected the notion that the AEDPA standard was "one of plenary review," holding that such a transformation of the standard would amount to defiance of Congress's will. *Id.*, at 243.

"When, as now, a petitioner can show only that *rational minds might differ* over how to apply certain *general* constitutional principles *to the specific circumstances* of his case, the current habeas corpus standard of review does not allow a federal court to invalidate a state conviction." *Id.*, at 246 (emphasis added). The First Circuit has thus fully rejected the notion that review of mixed questions remains "plenary."

Most recently, the First Circuit applied its *O'Brien* approach to an ineffective assistance claim in *Vieux* v. *Pepe*, No. 98-1864 (CA1 July 19, 1999). The court held that "the petitioner may succeed under the 'contrary to' clause only if Supreme Court caselaw directly governs the claim and the state court got it wrong." *Id.*, part III, para. 6. The federal court noted that the state court "conducted a proper *Strickland* analysis." *Id.*, part IV, para. 2. That is, it correctly recognized the governing rule. See *ibid.* In this case, unlike the typical *Strickland* case, the assessment of the attorney's performance involved a question of "pure" law regarding the federal wiretapping statute. With no Supreme Court precedent on the latter point, *Vieux* evaluated the state decision under "unreasonable application." *Id.*, part IV, paras. 9-10. In a footnote, the court reiterates that nearly all *Strickland* claims will pass the "contrary to" stage. *Id.*, n. 2. Hence, the main question in such cases will be the "unreasonable application" analysis.

The circuit position generally most favorable to habeas petitioners is that of the Third Circuit in *Matteo* v. *Superintendent*, 171 F. 3d 877 (CA3 1999) (en banc). Yet even the Third Circuit is closer to the state's interpretation than it is to the petitioner's.

Matteo largely follows *O'Brien*, *supra*. It asks, under the "contrary to" prong, whether "applicable Supreme Court precedent . . . *resolves* the petitioner's claim." *Id.*, at 888 (emphasis added). Still following the First Circuit, *Matteo* rejects the idea that " 'a general standard that covers the claim' " is sufficient for "contrary to" review. *Ibid.* (quoting *O'Brien*, 145 F. 3d, at 24). *West*-type claims, applying general

standards to specific facts, are thus excluded from "contrary to" review and move over to "unreasonable application."

The court quotes Senator Specter in the floor debate saying, " 'Unless it is unreasonable, a State court's decision applying the law *to the facts* will be upheld.' " *Id.*, at 890 (emphasis added); see 142 Cong. Rec. 7799 (1996). *Matteo* also specifically rejects the notion that "contrary to" review is "plenary" as petitioner uses that term. "This standard precludes granting habeas relief solely on the basis of simple disagreement with a reasonable state court interpretation . . . ." *Matteo*, 171 F. 3d, at 888. For claims evaluated under "unreasonable application," which will be most of them, *Matteo* reaffirms that mere disagreement is not enough. "To hold otherwise would resemble de novo review, *which we believe is proscribed by the statute*." *Id.*, at 889 (emphasis added).

For its standard, *Matteo* settles on this: "whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified." *Id.*, at 891. *Matteo* says its standard will result in the granting of more petitions than the First Circuit's "outside the universe of plausible, credible outcomes." *Id.*, at 889. *Amicus* believes that the reality is similar to the situation which existed in ineffective assistance cases before *Strickland* v. *Washington*, 466 U. S. 668, 696-697 (1984), when the differing formulations of the performance standard rarely changed the outcome of the case.

The *Matteo* court's approach to the issue in the case illustrates the extent of the change wrought by the AEDPA. Matteo's claim involved a phone call he made from jail, which was taped by police with the consent of the other party, Lubking. 171 F. 3d, at 882-884. The elements of Matteo's Sixth Amendment claim were established in Supreme Court precedent: "(1) the right to counsel must have attached at the time of the alleged infringement; (2) the informant must have been acting as a 'government agent'; and (3) the informant must have engaged in 'deliberate elicitation' of incriminating information from the defendant." *Id.*, at 892 (citing *Maine* v. *Moulton*, 474

U. S. 159, 170-171 (1985) and *United States* v. *Henry*, 447 U. S. 264, 269-270 (1980)); see also *Kuhlmann* v. *Wilson*, 477 U. S. 436, 459 (1986).

If the Third Circuit followed petitioner's view of the statute, it would have conducted "plenary 'contrary to' review," because "Supreme Court law had specifically designed a rule for the claim when the state court acted . . . ." Brief for Petitioner 38. There is no "absence of prescribed law" here, cf. *id.*, at 39, and hence, according to petitioner, no basis for "unreasonable application" review.

The *Matteo* court did just the opposite. It declared that the rule quoted above was not specific enough "to merit 'contrary to' review" and proceeded to "unreasonable application." 171 F. 3d, at 893. Yet the rule in question is surely no less specific than the rules in the pre-AEDPA "mixed question" cases where *de novo* review was applied. See *Strickland*, *supra*, 466 U. S., at 698 (ineffective assistance of counsel); *Wright* v. *West*, *supra*, 505 U. S., at 295 (lead opinion) (sufficiency of the evidence; *de novo* standard assumed and applied); *Thompson* v. *Keohane*, 516 U. S. 99, 102 (1995) (*Miranda*, question of when suspect is in "custody"). Indeed, the issue before the court in *Matteo* was governed by a rule *more* specific than the rules in *Strickland* and *West*, and comparable to the one in *Thompson*. If specificity is the criterion for choosing between "contrary to" and "unreasonable application," as the First and Third Circuits hold, and if the rule at issue in *Matteo* falls on the nonspecific side of the line, then all of the recent *de novo*/mixed question cases would also fall on that side.

Petitioner cites *Canales* v. *Roe*, 151 F. 3d 1226, 1229, n. 2 (CA9 1998) for the proposition that the Ninth Circuit requires plenary review of *Strickland* claims. Brief for Petitioner 39, n. 20. That decision merely states that the *Strickland* test is

"clearly established," a proposition never in dispute.[3] A far better example of the Ninth Circuit position on this issue is *Furman* v. *Wood*, 169 F. 3d 1230 (CA9 1999). *Furman* reaffirmed the Ninth Circuit's acceptance of the *Drinkard/Lindh* analysis, *i.e.*, that mixed questions are governed by the "unreasonable application" prong. *Id.*, at 1232. Applying the statute to the state court's decision on the *Strickland* claim, *Furman* reviewed the state court's holdings on both performance and prejudice and found them reasonable. *Id.*, at 1235. That is sufficient to bar relief under the statute. *Ibid.*

In the Tenth Circuit, petitioner relies on *Miller* v. *Champion*, 161 F. 3d 1249, 1253 (CA10 1998). Brief for Petitioner 39, n. 20. *Miller* is a curious opinion. It quotes the new standard, 161 F. 3d, at 1253, but never applies it. For the proposition that ineffective assistance claims are mixed questions and hence reviewed *de novo*, *Miller* simply cites *Parker* v. *Champion*, 148 F. 3d 1219, 1221 (CA10 1998), which does not mention the AEDPA at all. 161 F. 3d, at 1254. There is no discussion of § 2254(d)(1) in either *Parker* or *Miller* and no attempt to distinguish or criticize decisions from other circuits holding that the statute had changed the rule. The actual holding of *Miller* was that the petitioner had tried to develop the facts in state court, was denied the opportunity to do so, and hence was entitled to an evidentiary hearing in federal court. *Id.*, at 1253, 1259. Given that circumstance, § 2254(d)(1) is only tangential to the case, so the lack of discussion may be understandable.

Other Tenth Circuit cases before and since *Miller* have addressed the statute, and they paint a different picture. *Houchin* v. *Zavaras*, 107 F. 3d 1465, 1470 (CA10 1997)

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3. The actual holding of *Canales* is that petitioner's claim, a variation on the claim presently before this Court in *Roe* v. *Ortega*, No. 98-1441, was *not* clearly established. 151 F. 3d, at 1231. Hence there was no need to go into a detailed examination of how to apply the statute to a straight *Strickland* claim.

declared that the "AEDPA increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations." *LaFevers* v. *Gibson*, No. 98-6302 (CA10 June 16, 1999) interprets § 2254(d)(1) as allowing an exception to claim preclusion only "if: (1) the state court decision is in square conflict with Supreme Court precedent which is controlling on law and fact or (2) if its decision rests upon an objectively unreasonable application of Supreme Court precedent *to new facts*." *Id.*, part III, para. 2 (emphasis added). Manifestly, *Wright* v. *West*-type cases applying established standards to case-specific facts would fall under the second prong.

The Sixth Circuit has declined to take sides while noting, consistently with the position in this brief, that there is less to the circuit split than meets the eye. In *Nevers* v. *Killinger*, 169 F. 3d 352, 357-362 (CA6 1999), the court reviewed the positions of the other circuits. *Nevers* then held that fact-intensive, case-specific applications of established rules fall under "unreasonable application" under either approach. *Id.*, at 360-361.

Finally, in *Long* v. *Humphrey*, No. 98-3409 (CA8 July 14, 1999), the Eighth Circuit took an approach similar to *Nevers*. The "manifest necessity" standard for ordering a mistrial over the defendant's objection is a fact-intense, case-specific mixed question, and it falls under the "unreasonable application" prong under either *Drinkard* or *O'Brien*. *Id.*, para 7.

In summary, then, ten of the eleven numbered circuits have ruled on the question of how to evaluate, under § 2254(d), claims involving clearly established but general rules as applied to case-specific facts, when no Supreme Court case is factually indistinguishable. The circuits have unanimously concluded that such cases fall under the "unreasonable application" prong.

III. "Contrary to" governs rule selection, "unreasonable application" governs rule application, and "clearly established" qualifies both.

In *Neelley* v. *Nagle*, 138 F. 3d 917, 924-925 (CA11 1998), the Eleventh Circuit summarized the framework for applying 28 U. S. C. § 2254(d)(1) this way:

> "Thus, as we read the statute, a court evaluating a habeas petition under § 2254(d)(1) must engage in a three-step process: First, the court must 'survey the legal landscape,' using an inquiry similar to that under *Teague*, to ascertain the federal law applicable to the petitioner's claim that is 'clearly established' by the Supreme Court at the time of the state court's adjudication. Second, the court must determine whether the state court adjudication was contrary to the clearly established Supreme Court case law, either because the state court failed to apply the proper Supreme Court precedent, or because the state court reached a different conclusion on substantially similar facts. If the state court's decision is not contrary to law, the reviewing court must then determine whether the state court unreasonably applied the relevant Supreme Court authority. The state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect."

This statement of the rule is consistent with the language, history, and intent of the statute, and it provides a straightforward framework for analyzing habeas claims under the statute. With a few qualifications and explanations, *amicus* submits it should be adopted.

Section 2254(d)(1) contains two branches which share a common trunk. The trunk is the requirement that the rule in question be "clearly established" by Supreme Court case law. The term "clearly established" appears in *Teague* case law in *Sawyer* v. *Smith*, 497 U. S. 227 (1990), which borrows it from

the qualified immunity cases. *Id.*, at 236 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987)).

Although the new statute is not a rule of retroactivity, it does share this element with the *Teague* line. "Clearly established" requires a certain degree of specificity of the rule of law to be applied. The principle of reliability in capital sentencing, for example, is not specific enough to be an established rule. See *ibid.*

If the determination of whether there is a clearly established Supreme Court precedent governing the case is a *Teague*-like inquiry, as the borrowing of the term from *Sawyer* strongly implies, then it makes sense that this determination involves the same step of the decision-making process as *Teague*. There are "three distinct functions" in this process: "law declaration, fact identification, and law application." See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234 (1985). *Teague*, being a doctrine of retroactivity, necessarily addresses rules, *i.e.*, law declaration rather than law application. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Kennedy, J., concurring in the judgment).

While "contrary to law" review in some contexts encompasses both law declaration and law application, see Brief for Petitioner 34, n. 17, in this case Congress has created a separate clause for application. *Amicus* ACLU claims support from the fact that the Senate's modification of the House language lacks the prepositional phrase "to the facts" after the word "application." ACLU Brief 29. This, they would have the Court believe, worked a complete transformation of the subject matter of the second branch, changing the subject from application of law to fact into an unrelated inquiry about deriving new rules from existing ones. See also Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 871-872.

There are several answers to this contention. First, the attachment of the prepositional phrase "to the facts" is not essential to the meaning of "application" in this context. Justice

Kennedy's opinion in *Wright* v. *West*, *supra*, 505 U. S., at 308, refers to "specific applications" without adding "to the facts." Professor Monaghan's influential article, see *supra*, at 20, likewise refers to "law application" without appending "to the facts." Indeed, Professor Monaghan himself interpreted this language as applying to mixed questions, and Senator Cohen read his letter to that effect on the floor of the Senate. 141 Cong. Rec. S7839 (daily ed. June 7, 1995).

Second, none of the people involved in the transformation from the House to the Senate version saw the deletion of "to the facts" as transforming "application" from mixed questions to something else. The language emerged from "very extended negotiations" between Senator Specter and Senator Hatch, *id.*, at S7803, both of whom confirmed that the bill applied a reasonableness standard to the state court's application of the law to the facts. 142 Cong. Rec. 7772-7773 (1996) (statement of Sen. Hatch); *id.*, at 7799 (statement of Sen. Specter). While "application" can have a different meaning, the people who made the change from the House to the Senate version did not intend one.

Third, a rule that lower federal courts could overturn state decisions on mere disagreement with their application of established law, while the zone of disagreement on law declaration is protected from such interference, would be incompatible with the basic nature of § 2254(d) as a rule of prior adjudication. The underlying premise is that one bite at the apple, with review up the appellate chain, is normally all a litigant gets, with exceptions to prevent injustice when the normal mechanism seriously malfunctions.

This premise is consistent with this Court's "long history of distinguishing between collateral and direct review [citation] and confining collateral relief to cases that involve *fundamental* defects or omissions inconsistent with the *rudimentary*, demands of fair procedure [citations]." *Brecht* v. *Abrahamson*, 507 U. S. 619, 640 (1993) (Stevens, J., concurring) (emphasis added). This was precisely Senator Hatch's point. "After all,

Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law, it is hard to say that a fundamental defect exists." 142 Cong. Rec. 7772 (1996). Collateral attack on a final judgment is a drastic remedy, reserved for egregious errors. Simple disagreement on close questions regarding the application of settled law to varying facts does not rise to that level.

Unlike retroactivity, nothing in the principle of respect for prior adjudications by coordinate courts excludes that principle from the law application portion of the decision. "The comity interest [in *Teague*] is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because [the lower federal courts][4] are in no better position to judge. That would be the real thrust of a principle based on deference." *Wright* v. *West*, *supra*, 505 U. S., at 308 (Kennedy, J., concurring in the judgment). That is indeed the real thrust of § 2254(d). See *supra*, at 4, 8.

The First Circuit in *O'Brien* v. *Dubois*, 145 F. 3d 16, 22 (CA1 1998), objected that reading this branch to refer to mixed questions was "embroidery of the statute's text." In reality, it is right there in the word "application." Furthermore, this interpretation does not scavenge language discarded by the Senate from the House version, because the Senate kept the key operative word, "application," discarding only a prepositional phrase the negotiators evidently considered surplusage.

As the Third Circuit noted, the Fourth Circuit's "catalogue" of various situations warranting "contrary to" or "unreasonable application" treatment would be difficult to apply in practice. *Matteo* v. *Superintendent*, 171 F. 3d 877, 888 (CA3 1999) (en banc). Yet the First/Third Circuit approach has a similar difficulty. The line between rules specific enough for "contrary

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4. The opinion actually says "we" here, but this Court's plenary review authority on certiorari to state courts remains unimpaired. This statute is about the relative roles of the state and lower federal courts.

to" treatment versus those that warrant "unreasonable application" is not well defined. See *supra*, at 13-16.

Amicus CJLF submits that the simple approach is the best one. "Contrary to" applies to law declaration, as Professor Monaghan called it, or "pristine legal standard[s]," in the words of *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). "Unreasonable application" applies to "law application," also known as "mixed questions of law and fact." Identifying the rule of law and then applying the law to the facts is a familiar two-step process, which all members of the profession have been doing since law school. Analyzing habeas claims in this way will present the fewest difficulties.

Some decisions have indicated that this bifurcation approach applies a radically different level of scrutiny to the two aspects of the state decision. See *Matteo*, 171 F. 3d, at 887. Properly applied, it does not. "Contrary to" must be read in conjunction with the "clearly established" requirement. Because this is a *Teague*-like inquiry, it incorporates the principle of *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) that susceptibility to debate among reasonable minds is enough to render a rule "new" for *Teague* and not "clearly established" for § 2254(d)(1). Thus, the basic test of reasonableness applies to both branches of § 2254(d)(1).

"Contrary to" review is not *de novo* review of the underlying claim. The federal court does exercise independent judgment, but it exercises that judgment on whether the prerequisite for an exception to the prior adjudication bar has been met, *i.e.*, whether the state court decision is contrary to clearly established Supreme Court precedent. See Scheidegger, *supra*, 98 Colum. L. Rev., at 959.

In making this determination, the precedents of the federal circuits are not irrelevant, cf. *Furman* v. *Wood*, 169 F. 3d 1230, 1232 (CA9 1999), but neither is the circuit's own precedent controlling, or even particularly weighty. Instead, as under *Teague* when properly applied, a survey of the entire legal

landscape is called for; state as well as federal precedents must be considered. *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994).[5] The mere existence of conflicting precedent does not *per se* disqualify a rule from "clearly established" status, because some opinions fail to give careful thought to their holdings. However, a substantial split with reasoned opinions on both sides would establish that neither side is "clearly established." See *Vieux* v. *Pepe*, No. 98-1864, n. 4, and accompanying text (CA1 July 19, 1999) (applying similar reasoning, albeit under "unreasonable application" rather than "clearly established"). Conversely, unanimity among numerous reasoned opinions that a Supreme Court precedent does apply to a particular situation could render a perfunctory holding applying a different rule "contrary to . . . clearly established federal law."

Some complaints have been made that virtually no habeas petitions will be granted under such a standard. See, *e.g.*, ACLU Brief 9 ("virtually null set"). On the eve of the twenty-first century, cases that warrant relitigation of claims already addressed *should* be rare. Federal habeas is for "fundamental defects," *Brecht* v. *Abrahamson*, *supra*, 507 U. S., at 640 (Stevens, J., concurring), and our state courts and state corrective mechanisms have evolved to the point that few fundamental defects go uncorrected. Federal habeas is a safety net for situations that should never occur, but do on occasion. Both state and federal courts have been known to fail to apply clearly established Supreme Court precedent. See, *e.g.*, *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11 (1988) (*per curiam*).

Petitioner asks, "What review is required, though, when at the time the state court acted, there was *no* rule for resolving the claim to which its 'decision' could be 'contrary?' " Brief for

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5. There are *Teague* cases in the circuits granting habeas relief based solely on the circuit's own rule as an "old" rule, rather than surveying the entire legal landscape. *Caspari* makes clear these cases are wrongly decided, see Scheidegger, *supra*, 98 Colum L. Rev., at 948, and n. 433, and Congress has simply confirmed that.

Petitioner 36-37. He follows this question with language from *Lambrix* v. *Singletary*, 520 U. S. 518, 529, n. 3 (1997) describing a state of the law in which *Lambrix* held that the rule was new and the claim was *Teague*-barred. *Id.*, at 538. The answer is not "unreasonable application," as petitioner suggests; the answer is "none." In such cases the rule in question is not "clearly established." This trunk is common to both the "contrary to" and "unreasonable application" branches. If there is no clearly established rule to which the state decision could be "contrary," there is also no rule of which it could be an "unreasonable application."

The final question is how to judge "unreasonable application." As noted *supra*, at 15, *amicus* CJLF doubts that the various verbal formulations for the "unreasonable application" branch will really matter in practice. For colorful expression, it would be hard to beat the definition of "clearly erroneous" in *Parts and Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d 228, 233 (CA7 1988): "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." However, Congress used the word "unreasonable" and the best source for the meaning of that word would seem to be the reasonableness concept in existing habeas case law. That is the standard of *Butler*, *supra*, 494 U. S., at 415, "susceptible to debate among reasonable minds." See also *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990); *O'Dell* v. *Netherland*, 521 U. S. 151, 164 (1997) ("reasonable jurist," post-AEDPA but applying same standard).

In summary, then, the habeas court should proceed in three steps, as the Eleventh Circuit said in *Neelley*. See *supra*, at 19.

1) Conduct a *Teague*-like survey of Supreme Court opinions first, then the rest of the "legal landscape," to determine if the rule petitioner asserts and its applicability to the present case are "clearly established," which is equivalent to "dictated by precedent."

a) No: the paragraph (1) exception to the general rule of preclusion of § 2254(d) is inapplicable. Unless paragraph (2) applies, the claim is barred.

b) Yes: proceed to step 2.

2) Did the state court apply the clearly established rule of law?

a) No: the prior adjudication does not bar the claim. Proceed to the "merits" under pre-AEDPA law, *i.e.*, 28 U. S. C. § 2254(a) as previously construed.

b) Yes: proceed to step 3.

3) Was the state court's application of that rule to the facts of the case reasonable, *i.e.*, within the limits "susceptible to debate among reasonable minds"?

a) Yes: the claim is barred on the ground it has previously been adjudicated, unless § 2254(d)(2) applies.

b) No: the claim is not barred on this ground. Proceed to the merits, if there is anything left to decide.

This straightforward approach, faithfully followed, will substantially advance Congress's goal of speeding up habeas review, by ending the second-guessing of state courts on close questions and reserving collateral relief for cases of fundamental error. See *supra*, at 21-22; see *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result) (needles and haystacks). In Appendix A, we reprint the Tenth Circuit's unpublished disposition of an appeal to illustrate the proper application in a typical habeas case, where petitioner is simply judge-shopping his marginal claim past a second set of judges. The federal court reviews the state decision, sees that it applied the correct standard for the claim, and checks that the decision on the facts is a reasonable one. Case dismissed.

IV. There is nothing remotely unconstitutional about a modified rule of res judicata.

This Court denied certiorari on question 4, the claim that the statute, as applied by the Fourth Circuit, is unconstitutional. That claim is not "certworthy," as there is no split of authority. The issue was fully briefed to the Third Circuit in *Matteo* v. *Superintendent*, 171 F. 3d 877 (CA3 1999) (en banc). Yet even though the majority expressly adopted a "deference" standard, *id.*, at 890, not a single judge of the en banc court thought the supposed unconstitutionality of "deference" was even worth discussing.

Despite the denial of certiorari on the point, petitioner raises it on the basis of construing statutes to avoid constitutional questions. The definitive answer is given by *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998):

> "The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made."

Litigants must not be empowered to subvert the democratic process and have courts twist statutes beyond recognition simply by conjuring up specious constitutional hobgoblins. That would be the effect of accepting this argument in this case.

The constitutional argument is made at great length in Liebman & Ryan, *supra*, and refuted in CJLF's response article, Scheidegger, *supra*. If the Court wishes to consider the

constitutional question, we simply refer to the article for a full discussion. There is, however, one point we will include here.

In *Montana* v. *United States*, 440 U. S. 147, 149-151 (1979), the question presented was one of a state tax which, in practice, fell entirely on the federal government. The case thus involved the same issue as the great case of *McCulloch* v. *Maryland*, 4 Wheat. (17 U. S.) 316 (1819). There had been a prior judgment in state court against federal contractors in privity with the government. 440 U. S., at 151.

This Court had jurisdiction, *i.e.*, the power to decide the case, and the Court did decide the case. It decided, however, without reaching the underlying claim. It decided on the ground that the issue had been previously decided. See *id.*, at 164. Thus, a prior judgment of a state court can be the basis of decision in a subsequent suit in federal court, even in the Supreme Court, even on an issue as momentous as *McCulloch*, and even against the United States itself.

If that is so, is there any reason that a prior state decision cannot be the basis for decision in a case such as *Thompson* v. *Keohane*, 516 U. S. 99 (1995)? In that case, the underlying question was whether the conviction of a clearly guilty murderer should be thrown out, not because of any contention his confession was actually involuntary, but only because his un-Mirandized statement was made at a time when he might or might not have been in "custody." See *id.*, at 101-102.

For over two centuries, Congress has directed that, for most cases, state judgments are res judicata in federal courts. See *supra*, at 6. The legitimacy of its authority to do so is beyond question. Why is this statute, extending a rule of prior adjudication to cases like *Thompson*, any different? Is it because Congress chose not to impose full-blown res judicata, but instead required that the state court decision be reasonable? See Liebman & Ryan, *supra*, 98 Colum. L. Rev., at 781-782, and n. 389 (purporting to distinguish Full Faith and Credit Act as "quantitative" versus "qualitative" control). Unless the

Constitution forbids compromise, it does not force Congress to choose between *de novo* relitigation and completely abolishing federal habeas for state prisoners. See Scheidegger, *supra*, 98 Colum. L. Rev., at 892-893, 921, 957-958. The compromise contained in 28 U. S. C. § 2254(d), under any of its interpretations in the courts of appeals, is well within the power of Congress to specify the preclusive effect of state judgments in federal courts.

V. The state court correctly identified and reasonably applied the governing rule.

Under *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984), the general test for the prejudice element of an ineffective assistance claim is whether the "result of the proceeding [has been] rendered unreliable . . . ." For most cases, this is equivalent to a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* The focus is not entirely on the trial jury, however: "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—*including an appellate court*, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*, at 695 (emphasis added). In addition, there are cases holding that the prejudice requirement has not been met even if a different approach would have produced a different result, where that result would have been a malfunction of the system. See *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (perjury); *Lockhart* v. *Fretwell*, 506 U. S. 364, 369 (1993) (argument of law, plausible then but now clearly meritless).

Whether the kind of assessment of the evidence that the Virginia Supreme Court conducted here amounts to the appellate reweighing endorsed by *Strickland* is a question that should be answered in a case that actually turns on it. So, too, is the question of whether a hung penalty jury is a malfunction

of the system within the *Whiteside/Fretwell* rationale. See *Jones* v. *United States*, 527 U. S. __ (No. 97-9361 June 21, 1999) (slip op., at 8) (noting deadlock as jury's inability to fulfill its role, not as a normal operation of the process).

This is not the case, however. At the bottom line, the Virginia Supreme Court decided that petitioner had not met the "straight" *Strickland* requirement. After reviewing the evidence, the court concluded there was " 'no reasonable probability that the omitted evidence would have changed the conclusion . . . .' " *Williams* v. *Warden*, 487 S. E. 2d 194, 200 (Va. 1997) (quoting *Strickland*, 466 U. S., at 700). Whatever alternative holdings or dicta may be in the court's opinion, if this holding passes muster under the statute then habeas relief was properly denied.

Applying the three-step test outlined *supra*, at 25, *Strickland* is clearly established and was applied by the state court. The only question is whether the application was susceptible to debate among reasonable minds. As this Court recently emphasized while discussing an equivalent standard in *Strickler* v. *Greene*, 527 U. S. __, 119 S. Ct. 1936, 1953 (1999), the test is not "reasonable *possibility*" but rather "reasonable *probability*," and the difference matters. Given the height of this hurdle, the decision of the Virginia Supreme Court is not unreasonable.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

August, 1999

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX A

U. S. 10th Circuit Court of Appeals
DODSON v SCOTT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DAVID LEE DODSON, Petitioner-Appellant, v. H.N. SCOTT, Respondent-Appellee.	No. 97-6320 (D.C. No. 97-CV-727) (Western District of Oklahoma)

ORDER AND JUDGMENT[1]

Before **BALDOCK**, **EBEL** and **MURPHY**, Circuit Judges.

David Lee Dodson was convicted of rape in the first degree, anal sodomy, rape in the second degree by instrumentation, and oral sodomy. (R. 1 at 2; R. 14 at 1.) He appeals the district court's denial of his petition for a writ of habeas corpus, *see* 28 U. S. C. § 2254 (West. Supp. 1997), and its denial of his request for a certificate of appealability, *see* 28 U. S. C. § 2253(c)(2) (West Supp. 1997). (R. 16, R. 24.) We grant a certificate of appealability only upon a "substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c)(2).

Because Dodson's petition was filed after April 24, 1996, it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 117 S. Ct.

2059, 2068 (1997). Under AEDPA's amendments to § 2254, we may only grant a writ of habeas corpus if the state's adjudication of petitioner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U. S. C. § 2254 (West Supp. 1997).

Dodson claims that the evidence presented at trial was insufficient to support his conviction. Consequently, the appropriate Supreme Court case is *Jackson v. Virginia*, 443 U. S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."). The Oklahoma Court of Criminal Appeals recognized the applicability of *Jackson*, and its determination was not "contrary to" or "an unreasonable application of" *Jackson*'s holding. *See Dodson v. State*, No. F-83-767, at 4-5 (Okla. Crim. App. Dec. 18, 1986) (unpublished). (R. 12, Ex. C at 4-5.)

Dodson has not made a substantial showing of the denial of a constitutional right as required by 28 U. S. C. § 2253(c)(2) (West Supp. 1997). Dodson's request for a certificate of appealability is DENIED and his appeal is DISMISSED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

David M. Ebel

Circuit Judge

FOOTNOTES

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1. After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.